

GATEWAY COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT  
JUNE S. STOUT, INTERVENOR

IBLA 91-243

Decided November 15, 1994

Intervenor petition for award of costs, expenses, and attorneys' fees.

Petition granted in part.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses

Sec. 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1988), authorizes the award of attorneys' fees "as determined by the Secretary to have been reasonably incurred" for or in connection with a person's participation in an administrative proceeding under the Act.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses

Any fee-setting inquiry begins with the lodestar - the number of hours reasonably expended multiplied by a reasonable hourly rate.

Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). The reasonable hourly rate will usually be considered that rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses

The value of an attorney's time is generally reflected in his typical billing rate, and this rate is highly relevant in determining the prevailing community rate. The burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

4. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses

No rationale exists to justify an award of attorneys' fees from a permittee for work performed by petitioner's counsel challenging OSM's decision to vacate a notice of violation issued to the permittee.

APPEARANCES: Joseph M. Wymard, Esq., Robert J. Fall, Esq., Pittsburgh, Pennsylvania, for petitioner; Henry Ingram, Esq., Stanley R. Geary, Esq., Pittsburgh, Pennsylvania, for permittee.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On April 24, 1991, June S. Stout filed a petition for an award of costs, expenses, and attorneys' fees under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1988), and its implementing regulations, 43 CFR 4.1290-4.1295. Stout asserted eligibility for an award as the prevailing party in Gateway Coal Co. v. OSM, 118 IBLA 129, 98 I.D. 70 (1991). She also sought a Board order directing Gateway Coal Company (Gateway) to reimburse her for \$3,766.62 in costs and to award attorneys' fees in the amount of \$46,400.

We will begin by setting out background facts necessary for an understanding of the dispute. The dispute commenced with an OSM investigation in response to a citizen's complaint filed by Stout, which was followed by the issuance of a Notice of Violation (NOV), citing Gateway for two violations of SMCRA. The first was a violation of section 522(e)(5) of SMCRA, 30 U.S.C. § 1272(e)(5) (1988), which prohibits surface mining operations within 300 feet of Stout's occupied dwelling. The second was a violation of section 522(e)(4) of SMCRA, 30 U.S.C. § 1272(e)(4) (1988), which prohibits surface mining operations within 100 feet of a public road.

On April 26, 1982, Gateway filed an application for review, claiming "valid existing rights" to conduct activities inside the 100- and 300-foot buffer zones. On December 16, 1982, Stout sought to intervene, and intervenor status was granted on August 15, 1983. On January 16, 1984, OSM issued an order purporting to vacate the NOV. Stout filed an application for review of this order on February 13, 1984, and, on February 21, Gateway filed preliminary objections to Stout's application for review. On February 27, 1984, OSM filed its answer to Stout's application.

In an April 20, 1984, decision by Administrative Law Judge Joseph E. McGuire, OSM's assertion that it had vacated the NOV was rejected, and Stout was deemed to have a statutory right to involvement in the proceedings that would be adversely affected if the NOV were vacated without her consent. Gateway filed a motion for reconsideration or, in the alternative, certification of the issue for interlocutory appeal to this Board. The appeal was certified to this Board, and in Gateway Coal Co. v. OSM, 84 IBLA 371 (1985), the Board held that OSM lacked jurisdiction to vacate the NOV because subject matter jurisdiction had lodged with the Hearings

Division, Office of Hearings and Appeals. The case was remanded and, on February 25, 1985, Judge McGuire denied OSM's motion to vacate and scheduled a hearing on Gateway's application for review.

Prior to the hearing, OSM and Gateway again filed motions to vacate the NOV. These motions were denied, and a hearing on the merits was concluded on May 1, 1985. By order of July 15, 1986, Judge McGuire suspended consideration of Gateway's application pending promulgation of a final rule defining valid existing rights consistent with this Board's February 25, 1986, order in Valley Camp Coal Co. v. OSM, IBLA 84-632. See Valley Camp Coal Co. v. OSM, 112 IBLA 19, 23-24, 96 I.D. 455, 458 (1989). Stout then filed a mandamus action in the United States District Court for the Western District of Pennsylvania (C.A. 88-1891) to compel Judge McGuire to lift his suspension of the case. On Sept. 27, 1988, OSM filed a motion to lift the stay of the proceedings.

In his November 25, 1988, decision, the Judge denied Gateway's application for review and found that Gateway lacked valid existing rights under the 1979 definition of valid existing rights. Gateway appealed to this Board, and in Gateway Coal Co. v. OSM, 118 IBLA 129, 98 I.D. 70 (1991), we ruled, *inter alia*, that Gateway had not shown that it had valid existing rights, affirmed the NOV, and remanded the case to OSM for appropriate action.

Gateway sought judicial review of the Board's decision and, by order of June 11, 1992, the District Court for the Western District of Pennsylvania granted OSM's motion for summary judgment. Gateway Coal Co. v. OSM, No. 91-592 (D.W.D. Pa. 1992). On appeal to the Third Circuit, the Court of Appeals affirmed the decision of the District Court. Gateway Coal Co. v. OSM, No. 92-3366 (3rd Cir. Feb. 2, 1993).

Stout had previously filed the petition for an award of costs, expenses, and attorneys' fees now under consideration. In a June 6, 1994, order, we noted that several prerequisites must be met to be eligible for an award of costs, expenses, and attorneys' fees. Initially, there must be a determination that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed. Save Our Cumberland Mountains, Bledsoe County Chapter, 127 IBLA 245, 249 (1993). Two additional standards must be met by a party petitioning for an award. First, "some degree of success on the merits" must be shown. Second, the petitioner must have made a substantial contribution to a full and fair determination of the issues.

In our June 6 order, we found that Stout had enjoyed success on the merits and that she had made a substantial contribution to the determination of the issues. OSM had issued an NOV citing violations of SMCRA as a direct result of Stout's citizen complaint. Stout had successfully opposed both OSM and the permittee when OSM attempted to vacate the NOV. As a result of her efforts, the NOV was sustained and the question of Gateway's valid existing rights was litigated and decided adversely to Gateway. We therefore found that Stout was eligible for and entitled

to an award of costs and expenses including attorneys' fees under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1988). See also 43 CFR 4.1294(a)(1).

Having determined that Stout was eligible and entitled to an award, we examined Stout's petition for costs and expenses and found it to be supported by receipts. Gateway admitted that Stout's petition reflected her costs and expenses. Accordingly, we granted \$3,766.62 in costs and expenses. However, we noted that more definitive information regarding the hours Stout's attorneys had devoted to various activities was needed before we could determine whether time actually spent was time reasonably spent, and we granted Stout 30 days to file an amended petition. An amended petition was subsequently filed.

Stout's initial petition for attorneys' fees included affidavits of Joseph M. Wymard and Robert J. Fall, both of whom served as Stout's counsel. These affidavits described the background of each attorney and set forth in some detail the tasks for which attorneys' fees were sought. Wymard's fee rate was \$150 per hour and Fall's fee rate was \$100 per hour. The initial petition stated that Wymard had devoted 210 hours rendering legal services during the period November 1981 through March 1991, and Fall had devoted 149 hours rendering legal services during the period July 15, 1983, through March 18, 1991. In the amended petition the time devoted to the case was amended to 194 and 145.5 hours, respectively.

Gateway objects to Stout's amended petition and contends that it is insufficient to establish what the historic community market rates were during the relevant period for attorneys of Wymard and Fall's experience, skill, and reputation. Gateway further charges that Stout is not entitled to fees from Gateway for hours that Stout spent litigating matters against OSM. Gateway notes that Stout seeks an award of costs and attorneys' fees solely against Gateway, but that many of the services for which she seeks fees concern matters adverse to OSM and the Administrative Law Judge, but not to Gateway. Gateway argues that it should not be required to pay attorneys' fees for (i) work done by Stout's attorneys challenging OSM's attempt to vacate the NOV; (ii) Stout's instituting and prosecuting a mandamus action against the Administrative Law Judge in Federal court; (iii) work done when OSM and Stout were "on the same side"; (iv) reviewing the Administrative Law Judge's order suspending consideration of the case pending a final regulation defining valid existing rights; and (v) reviewing Gateway's petition for judicial review of Gateway Coal Co. v. OSM, supra. Finally, Gateway contends that the schedule of hours for which fees are claimed is insufficient to allow the Board to determine if the hours claimed were reasonably expended. Gateway notes that, despite having amended her petition on two occasions, Stout has provided no documentation (such as contemporaneous time sheets or bills) to support the hours that Wymard and Fall claim to have worked.

[1] Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1988), authorizes the award of attorneys' fees "as determined by the Secretary to have been

reasonably incurred" to any person for or in connection with his participation in any administrative proceeding under the Act. Regulation 43 CFR 4.1294(a)(1) additionally provides for an award of appropriate costs and expenses, including attorneys's fees, from the permittee, upon a finding that the party seeking the award has initiated or participated in an administrative proceeding reviewing enforcement actions, that a violation of the Act, regulations, or permit has occurred, and the Administrative Law Judge or the Board determines that the party seeking the award made a substantial contribution to a full and fair determination of the issues.

[2] Having previously determined that Stout was entitled to and eligible for an award, we turn to a determination of the amount to be awarded. Any fee-setting inquiry begins with the lodestar - the number of hours reasonably expended multiplied by a reasonable hourly rate. Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). The reasonable hourly rate will normally be the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984); Natural Resources Defense Council v. OSM, 107 IBLA 339, 393, 96 I.D. 83, 112 (1989). The fee applicant must produce satisfactory evidence of this rate, and the prevailing market rate is usually deemed to be reasonable. Blum v. Stenson, *supra*.

As noted above, Gateway attacks Stout's petition because it lacks evidence of the historic community market rates of other attorneys with skill, experience, and reputation comparable to Stout's counsel. As originally filed on April 24, 1991, Stout's petition contained only the affidavits of Wymard and Fall and a schedule of attorneys' hours for which fees were sought. In his original affidavit, Wymard stated that he had practiced law continuously in Pennsylvania since 1962 and that, pursuant to an agreement with Stout, his services were being billed at \$150 an hour. Fall stated that he had practiced law continuously in Pennsylvania since 1980 and that, pursuant to an agreement with Stout, he billed at a \$100 hourly rate. This evidence was clearly inadequate. Blum v. Stenson, *supra*, makes plain that the affidavits of petitioner's own counsel are insufficient to establish the prevailing market rate:

To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. [Emphasis added.]

465 U.S. at 896 n.11.

In an affidavit filed January 18, 1994, Wymard stated that during the course of the litigation, which lasted from 1981-91, a large percentage of his practice involved civil litigation and family litigation presenting complex issues of marital property and business valuations. During this period, his billable rates ranged from \$125-\$200 per hour depending on the

complexity of the case. Wymard stated that given the risks involved in the instant case and the complexity of the issues, an hourly rate of \$150 was fair and reasonable based upon his years of practice and the customary rate charged by attorneys of similar experience and ability in Pittsburgh during the relevant period.

In response to the Board's June 6, 1994, order, Wymard presented a more detailed schedule of the hours and tasks that he and Fall had performed, and submitted affidavits of Peter J. Mansmann and Daniel J. Beggy. The affidavits are almost identical. The affiant states that the skill, experience, reputation, and work product of Wymard and Fall are well known to the affiant, and based upon that knowledge, personal experience, and information of the fees charged by attorneys with similar experience, a \$150 hourly rate for Wymard and a \$100 hourly rate for Fall were reasonable, common, and well within the range of attorneys' fees in the Pittsburgh area during the 1980's.

[3] An attorney's normal hourly billing rate is generally a reflection of the value of the attorney's time. See Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3rd Cir. 1973). Thus, the actual rate that Wymard and Fall can command in the marketplace is highly relevant when determining the prevailing community rate. Wymard states that he charged between \$125-\$200 per hour in the period between 1981 and 1991, and that \$150 per hour is reasonable compensation for the services he performed for Stout. Fall does not state a similar range of charges, but seeks \$100 per hour for his services.

Although they might be characterized as "sketchy," the Mansmann and Beggy affidavits do provide evidence of the prevailing market rate in the Pittsburgh area. The affidavits tie the rates that Wymard and Fall were charging to billing rates for like services charged by other counsel in the area, who had similar skill, experience, and reputation. Wymard and Fall's charges are said to be well within the range of reasonable charges. We find that the requested rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. at 896 n.11.

Gateway complains that Stout submitted insufficient evidence of historic hourly rates. However, Gateway does not claim that the hourly rates sought by Wymard and Fall are too high. Gateway is, and has been, represented by Pittsburgh counsel throughout the decade-long litigation. Had Gateway deemed the rates stated by Wymard and Fall unreasonable, it would be expected to say so. Its silence on this point is telling. From the evidence before us, we deem the hourly rates stated by Wymard and Fall to be in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

The amended schedules of attorney hours submitted by Wymard and Fall on July 7, 1994, are sufficient for our purposes to determine whether the hours claimed were reasonably expended. Itemization present in the amended schedule of attorney hours has been useful in determining the time expended

for individual tasks. A person seeking attorneys' fees is not required to record in great detail how each minute of time was expended, but the general subject matter of the time expenditures should be identified. Utah International, Inc. v. Department of the Interior, 643 F. Supp. 810, 826 n.31, quoting from Hensley v. Eckerhart, 461 U.S. 424, 437 n.12 (1983).

[4] Gateway's challenge to an award of fees for those hours incurred by Stout in litigating matters against OSM has merit. In Natural Resources Defense Council v. Environmental Protection Agency, 595 F. Supp. 65, 70 n.1 (D.D.C. 1984), Judge Flannery stated that he could find no rationale to justify an award of attorneys' fees against the Environmental Protection Agency for work performed by NRDC against industry intervenors. See also Avoyelles Sportsmen's League v. Marsh, 786 F.2d 631, 636 (5th Cir. 1986), and NRDC v. OSM, 107 IBLA at 380-81, 96 I.D. at 105 (1989). A similar holding is applicable here.

In its February 22, 1994, answer to Stout's initial petition for fees, Gateway points to specific tasks that it claims it should not be required to pay for, consistent with Judge Flannery's holding. Stout's amended schedule of attorney hours does not contain certain of the tasks that Gateway found objectionable in the initial schedule. However, Stout has not responded to Gateway's argument. After review of the tasks described in the amended schedule, we find that Gateway need not pay for 21.5 of the 194 hours sought by Wymard in his July 1994 amended schedule, and that it need not pay for 7 of the 145.5 hours sought by Fall. A schedule of the hours allowed and disallowed is found in the appendix to this decision.

The end result of the above-described analysis is that we approve Stout's petition in part. Specifically, Stout is awarded fees in the amount of \$39,725, of which \$25,875 is attributable to Wymard's 172.5 hours at \$150 per hour and \$13,850 is attributable to Fall's 138.5 hours at \$100 per hour. Costs in the amount of \$3,766.62 have been previously granted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for an award of attorneys' fees is approved in part.

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R. W. Mullen  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

**APPENDIX**  
**JOSEPH M. WYMARD**  
**SCHEDULE OF ATTORNEY'S HOURS**  
**Filed July 7, 1994**

				Non-
<u>1981</u>	<u>Hours</u>	<u>Compensable</u>		
Nov/Dec	Consultations with client; correspondence with OSM requesting inspections and making citizen report and site inspections	12.0		
<u>1982</u>				
Jan/May	Consultation with client; research of law and review of applicable federal and state statutes and regulations; contact with OSM; review of 4/2/82 Notice of Violation	20.0		
<u>1983</u>				
July	Meeting with Robert J. Fall, Esquire, to assign research project			1.0
Nov	Meeting with F. Scott, Engineer; trip to Stout property to inspect site			4.0
<u>1984</u>				
Jan	Review OSM request to vacate NOV (1.0); meeting with Robert J. Fall and Stout (2.5); draft objection for Robert J. Fall follow-up (2.0); review Robert J. Fall memo and objection to motion to vacate (2.5); meeting with Robert J. Fall and draft of application for review for Robert J. Fall follow-up (4.0)	12.0	12.0	
Feb	Review application for review and brief; review OSM answer to application for review	1.0	1.0	
Apr	Review 4/20/84 Order for ALJ; meeting with client to review status		2.0	2.0
<u>1985</u>				
Jan	Review 1/25/85 IBLA decision and meeting with client to discuss		1.5	1.5
Apr	Preparation for ALJ hearing; consultation with experts; research and review of exhibits; preparation of witnesses to testify; consult with Robert J. Fall re: law and procedure, trial strategy	80.0		
Apr 29	Meeting at portal site with Judge McGuire/OSM/ Gateway		10.0	
	131 IBLA 219			
	Non-			
	<u>Hours</u>	<u>Compensable</u>		
Apr 30	Attendance as lead counsel at hearing; prepare for following day		10.0	



May 1	Attendance as lead counsel at hearing	10.0		
Aug	Review of Gateway's post-hearing brief; meeting with Robert J. Fall; draft outline as to response	5.0		
Oct	Review draft of Stout brief (1.5); meeting with Robert J. Fall with suggested changes (1.5); review OSM brief (1.0); review final draft of Stout brief (1.0)	5.0	1.0	
<u>1986</u>				
July	Review ALJ order of 7/15/86 (0.5); meeting with Robert J. Fall to discuss impact of order (1.0); meeting with Stout to explain order (1.5)	3.0	3.0	
<u>1988</u>				
Nov	Review ALJ decision on NOV, meeting with Robert J. Fall (1.5); research impact of decision on closing of Gateway's mine (4.0); meeting with client to review options (2.0)	7.5		
<u>1989</u>				
Jan/Feb	Review Gateway's brief to IBLA and meeting with Robert J. Fall (1.5); review draft of Stout brief and advice as to changes (2.5); review final Stout brief (1.0)	5.0		
Mar	Review OSM brief to IBLA; meeting with Robert J. Fall	1.0	0.5	
<u>1991</u>				
Mar	Review 3/16/91 IBLA decision, meeting with Robert J. Fall to discuss (1.5); review Gateway's Petition for Review (0.5); meeting with client to discuss IBLA decision and further action by Gateway (2.0)	0.5		4.0

**ROBERT J. FALL**  
**SCHEDULE OF ATTORNEY'S HOURS**  
**Filed July 7, 1994**

	<u>Hours</u>	<u>Compensable</u>	Non-
07/15/83 Meeting with JMW, discuss status of case, receive assignment to review file and prepare for DER action	1.0		
09/17/83 Commence research for memo on Valid Existing Rights (VER)	1.0		
10/05/83 Research for memo			2.0
10/06/83 Research and prepare draft of memo	5.5		
10/07/83 Prepare final memo			1.5
10/26/83 Preparation for meeting with engineer, re: VER	1.5		
01/09/84 Telephone conference with Gateway Attorney Geo. Brooks			0.5
01/11/84 Discussion with OSM attorney	0.5		
01/12/84 Meeting with Attny Alan McCloud, re: review his research and compare information for engineer's expert testimony, letter to OSM attorney	3.0		
01/21/84 Prepare objection to motion to vacate NOV	1.0	1.0	
02/02/84 Prepare Application for Review and Brief	2.5	2.5	
04/27/84 Review of 4/20/84 ALJ order		1.0	1.0
05/03/84 Telephone conf with ALJ/OSM/and Gateway	0.5		
06/28/84 Review Gateway Brief to IBLA dated 6/22/84	2.0		
07/18/84 Research and prepare Stout Brief, re rights and status of Intervenor	5.0		
01/30/85 Review of 1/25/85 IBLA decision	0.5		
04/8-12/85 Trial preparation consisting of preparing trial outline assemble and review Exhibits, draft suggested questions for witnesses, correspondence and preparation of witnesses	35.0		
04/29/85 Meeting at portal site with Judge McGuire/ OSM/Gateway			10.0
04/30/85 Attendance as co-counsel at ALJ hearing, prepare for following day's hearing	10.0		
05/01/85 Attendance as co-counsel at ALJ hearing	10.0		
08/20/85 Review Gateway post-hearing Brief, meeting with JMW, commence initial response and Stout Brief			5.0
09/27/85 Review transcripts and exhibits, initial preparation for Stout post hearing Brief	4.0		
10/08/85 Research for Stout Brief	3.0		
10/09/85 Research for Stout Brief	3.0		

			<u>Non-</u>
			<u>Hours</u> <u>Compensable</u>
10/11/85	Research for Stout Brief, prepare rough draft	7.0	
10/14/85	Prepare final draft of Stout Post-hearing Brief	5.0	
07/21/86	Review ALJ order of 7/15/86; research law; meeting with JMW		2.0 2.0
11/28/88	Review of Judge McGuire's decision on NOV, meeting with JMW		1.5
01/28/89	Review of Gateway Brief to IBLA	1.5	
02/07/89	Research for Stout Brief		3.0
02/08/89	Research for Stout Brief		3.0
02/11/89	Research for Stout Brief	3.5	
02/13/89	Research for Stout Brief		2.5
02/13/89	Preparation of final draft of Brief for JMW review		5.5
03/11/91	Review of 3/6/91 IBLA decision, meet with JMW to discuss		1.5
03/18/91	Review of Gateway's Petition for Review	0.5 0.5	